88-1599

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

In Re: FRANK J. VONDERSAAR,
Petitioner

On Writ of Mandamus to United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Did the district court err in refusing to rule on a motion for preliminary injunction for a period of over four months?

PARTIES TO THE PROCEEDING BELOW

Edwin Meese, III; Caspar W. Weinberger; Elizabeth H. Dole; William Barney, III; Michal Varner; Judson Shattuck; Leslie J. Vondersaar nka Steadman; Jene Fuller and James Fuller.

TABLE OF CONTENTS

Prayer..... 1

Opinion Below..... 2

Jurisdiction..... 3

Constitutional & Statutory Provisions 4

Statement of the Case..... 4

Existence of Jurisdiction Below..... 5

Reasons for Granting the Writ..... 6

Appendix..... 10

TABLE OF AUTHORITIES

Quillon v. Wallcott.....4
434 U.S. 494 (1978)

Santosky v. Kramer.....4
455 U.S. 745 (1982)

Dred Scott v. Sanford.....8,9
19 How. 393 (1857)

Korematsu v. United States.....9
323 U.S. 214 (1944)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

In re: FRANK J. VONDERSAAR,
Petitioner,

PETITION FOR WRIT OF MANDAMUS

PRAYER

Petitioner prays for a writ of mandamus directed to the United States District Court for the Southern District of Ohio, Western Division at Dayton, directing and commanding the Honorable Herman J. Weber to immediately rule on the motion for preliminary injunction filed by petitioner on 2 November 1988. Petitioner also requests an order directing and commanding the Honorable Herman J. Weber to resume action on this case, contra his order of Feb 3, 1989 in appendix.

OPINION BELOW

The District Court has refused to rule on petitioner's motion for preliminary injunction for over four months.

Petitioner filed an appeal with the U.S. Court of Appeals for the Sixth Circuit in December 1988. Reference Sixth Circuit Case No. 88-4175. While the appeal was pending, petitioner moved the Court of Appeals to grant a preliminary injunction. That motion was ignored by the Sixth Circuit from 29 December 1988 until the appeal was dismissed. The appeal was dismissed on jurisdictional grounds on 16 February 1989. Petitioner objected to the dismissal and moved to amend his appeal to correct jurisdictional problems, per 28 USC 1653. The Court of Appeals denied a motion to reconsider, without addressing the motion to amend. See appendix

JURISDICTION

Jurisdiction for issuance of the writ is provided for in 28 USC 1651(a). Petitioner's appeal to the U.S. Court of Appeals for the Sixth Circuit was dismissed on jurisdictional grounds. The Sixth Circuit has refused to reconsider, or to allow amendment to correct jurisdictional problems. Time is of the essence.

In particular, the relief sought is not available in any other court because: (1)petitioner requests a writ to command a Federal District Court Judge to timely execute his Constitutional duty to rule on a motion for preliminary injunction; (2)only the U.S. Supreme Court and the Sixth Circuit Court of Appeals have jurisdiction to issue such a writ; (3)petitioner has unsuccessfully attempted to obtain the writ from the Sixth Circuit. See appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Refusal of the District Court to rule on petitioners motion for preliminary injunction has deprived petitioner of his right to due process of law as guaranteed by the Fifth Amendment to the U.S. Constitution, and to his Constitutional right to familial association with his daughter, as interpretted in Quillon v. Wallcott, 434 U.S. 494 (1978) and Santosky v. Kramer, 455 U.S. 745 (1982).

STATEMENT OF THE CASE

Petitioner, Frank J. Vondersaar, filed suit against defendants Edwin Meese, et. al. in U.S. District Court in Dayton, Ohio, on 2 June 1988. The principal case alleged a conspiracy on the part of the U.S. Departments of Justice, Defense and Transportation as well as other individuals to deprive

petioner of his civil rights. Reference Southern District of Ohio Case No. C-3-88-269. Petitioner filed a motion for preliminary injunction in that case on 2 November 1988. Despite a motion requesting an immediate ruling on the preliminary injunction, filed 21 November 1988, the District Court has refused for over four months to rule on the preliminary injunction motion.

EXISTENCE OF JURISDICTION BELOW

Jurisdiction in the District Court is based upon violation by defendants of the U.S. Constitution and 42 USC 1983, 1985 and 1986. Alternatively, jurisdiction is based on diversity. Jurisdiction in the Court of Appeals was initially pled based upon the District Courts "de facto" denial of petitioner's motion for preliminary injunction. Following dismissal by the Court of Appeals, petitioner moved to amend his

appeal to request a writ of mandamus from the Court of Appeals under 28 USC 1651(A). The request to amend was not ruled on by the Sixth Circuit in it's order denying a rehearing.

REASONS FOR GRANTING THE WRIT

The refusal of the District Court to rule on petitioners motion for preliminary injunction in over four months makes a mockery of the U.S. Constitution's guarantee of equal protection under the law and specifically violates the "due process" clause of the Fifth Amendment. In refusing to rule on petitioners motion in a timely manner, the District Court has effectively deprived petitioner of his liberty interest of familial association with his daughter. Even if the District Court had denied petitioner's motion in a timely manner, petitioner could have appealled that

denial three months ago. The obvious attempt by the District Court and the Court of Appeals to avoid their Constitutional obligation to decide matters of law, and in so doing, undermining the rule of law in the United States, should be overruled by the Supreme Court.

The adage "justice delayed is justice denied" can have no clearer manifestation than in this case. In attempting to deny petitioner access to the courts, the District Court did not even exhibit the temerity shown by the Sixth Circuit when it issued a sleazy dismissal during a time petitioner had notified the Court of Appeals he would be out of state and unavailable. The District Court has chosen to take a more indirect route by merely ignoring petitioner for over four months.

Petitioner notes that in the Sixth Circuit dismissal of the appeal, filed

Feb 16. 1989, the court indicated "the record discloses that the district court is presently engaged in the prompt disposition of his request for injunctive relief." If the Sixth Circuit considers no ruling on a motion for preliminary injunction in over four months to be "prompt disposition". petitioner suggests the new program for drug testing of federal employees begin with the bench of the Sixth Circuit.

Petitioner pointed out to the Sixth Circuit Court of Appeals that their dismissal of petitioner's appeal had all of the equitable, moral and ethical persuasiveness of the pre-Civil War, U.S. Supreme Court's infamous Dred Scot decision. I urge this Supreme Court to immediately grant the Writ of Mandamus petitioner requests and thereby refuse to add it's weight to the already disgraceful abuse of the U.S. legal justice system that has taken place in

this case. The Court should avoid the temptation to add Vondersaar to the list of Dred Scott and Korematsu.

Frank J. Vondersaar

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APPENDIX

US COURT OF APPEALS FOR SIXTH CIRCUIT

No. 88-4175 filed Mar 21, 1989 ORDER

BEFORE: GUY and NORRIS, CJ; and BELL, DJ

This pro se appellant has moved for the reconsideration of this court's order of Feb. 16, 1989, which dismissed his appeal for lack of jurisdiction.

After careful consideration of the motion to reconsider, the panel concludes that it committed no misapprehension of law or fact in its order of Feb. 16, 1989. Fed. R. App. P. 40(a).

Accordingly, it is ORDERED that the motion to reconsider be and hereby is denied.

U.S. COURT OF APPEALS SIXTH CIRCUIT

No. 88-4175 filed 27 Feb. 1989

PLAINTIFF-APPELLANT'S OBJECTION TO ORDER OF DISMISSAL, MOTION FOR RELIEF FROM ORDER, AND MOTION TO AMEND

Plaintiff-appellant, Frank J. Vondersaar, hereby objects to the February 16, 1989 Order of the Court dismissing this appeal for lack of jurisdiction, for the reasons stated in the memo below. Plaintiff also moves the Court for relief from that order, under FRCP 60 (b)(1), for the mistake of plaintiff in requesting the wrong relief, as set forth below. Plaintiff also moves the Court to amend plaintiff's brief, reply and/or notice of appeal, as allowed by 28 USC 1653, to correct the defective allegation of jurisdiction.

MEMORANDUM

1.Plaintiff-appellant objects to the

Feb. 16, 1989 Order to Dismiss this appeal for the following reasons. First, the court acted improperly in dismissing the appeal rather than requesting plaintiff amend his pleadings to properly allege jurisdiction as allowed by 28 USC 1653, particularily in view of plaintiff being a pro se appellant. Second, the court exhibited bias and sleazy methods in issuing it's order during the time plaintiff had notified the clerk of the court by mail in January 1989 that plaintiff would be out of the state and unavailable during late February. (Exhibit 1) Except for an early return, plaintiff would have missed the 10 day window for objecting to this improper order. As it is, plaintiff had less than 24 hours to research this Objection, prepare it and deliver it to the clerk. The Courts sudden rush to issue it's order while plaintiff was out of state is further

highlighted by its contrast to the Courts refusal to rule for over a month on plaintiff's motion to the Court of Appeal for preliminary injunction. Finally, plaintiff disputes the dicta in the order that states that plaintiff is not entitled to relief in the form of a writ of mandamus, as the facts in this case clearly indicate that writ would be appropriate. The writ is to be used in federal court to "confine an inferior court to a lawful exercise of its prescribed jurisdiction OR TO COMPEL IT TO EXERCISE ITS AUTHORUTY WHEN IT IS ITS DUTY TO DO SO." Will v. United States, 389 U.S. 90,95.

2.Plaintiff requests relief from the Order to Dismiss, based on plaintiff's mistake in requesting legal rather than equitable relief from the Court of Appeals in this case. FRCP rule 60 (b)(1) clearly allows such relief, and such relief is justified based on the

reasons in para 1.

3.Plaintiff moves to amend all relevant pleadings in this appeal to reflect his request for equitable relief, in the form of a writ of mandamus, rather than legal relief by way of appeal.

Such amendment is specifically authorized by 28 USC 1653, and is appropriate in this case. Plaintiff hereby amends appellant's brief, reply and/or notice of appeal to reflect his request for relief to be in the form of a writ of mandamus, directing the trial judge to immediately rule on plaintiff's motion for preliminary injunction filed in the trial court in November 1988, and ignored by the trial judge for the past three months.

4.In the event the Court refuses to grant either of the above motions, plaintiff requests the Court to instruct the trial court to resume its "timely?" disposition of plaintiff's case, since

Judge Weber has indicated he will take no action until directed to do so by the Court of Appeals. (Exhibit 2)

5.Finally, appellant would point out that, while the Court of Appeals Order to Dismiss might arguably be technically justifiable, it has all of the equitable, moral aud ethical persuasiveness of the pre-Civil War U.S. Supreme Court's infamous Dread Scott decision.

US COURT OF APPEALS FOR SIXTH CIRCUIT

No. 88-4175 filed Feb 16, 1989 ORDER

Before: GUY and NORRIS, CJ; and BELL, DJ

This matter is before the court upon consideration of appellees' motion to dismiss the appeal for want of jurisdiction. Appellant has filed a response to that motion. In addition, he also seeks a preliminary injunction by this court, and has filed a motion requesting expedited review of that matter.

Review of the record, particularly the district court's docket sheet, indicates that on June 2, 1988, appellant filed a complaint pursuant to 42 USC 1983, 1985, and 1986 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), in the District Court for the Southern District of Ohio. The district court then referred the case to a magistrate for consideration of any pretrial motions under 28 USC

636(b), including appellant's motion for a preliminary injunction. Despite appellant's request for immediate action inregard to that motion, the magistrate declined to address the matter pending his receipt of additional pleadings from the parties concerning the question of subject matter jurisdiction. Appellant then objected to the magistrates refusal to act by filing an "appeal" to a judge of the district court on Dec 7,1988. After passage of five days without any further action on the part of the district court, appellant filed this appeal, based upon the belief that the district court's failure to immediately rule upon his motion for a preliminary injunction constituted de facto denial of his request for that relief.

Appelees now move to dismiss the appeal due to lack of jurisdiction. We agree. Pursuant to 18 USC 1291 and 1292 this court only has jurisdiction over

appeals from a final order or judgment or certain, specified interlocutory orders of the district court. The existence of some type of order or judgment is a prerequisite under either statute. Consideration of the above facts demonstrates that the instant appeal simply does not satisfy that requirement as the district court has yet to act upon appellant's request for a preliminary injunction. Appellant concedes this fact in his notice of appeal, but argues that the district court's refusal to issue an immediate injunction stands as a "de facto" denial of that relief, thereby giving rise to appellate jurisdiction. No authority, statutory or other, supports such a proposition. At most, appellant could challenge the district court's refusal to take action on his motion for preliminary injunction by resorting to a petition for a writ of mandamus under 28

USC 1651. Appellant, however, is clearly not entitled to such extraordinary relief, especially as the record discloses that the district court is presently engaged in the prompt disposition of his request for injunctive relief. Allied Chemical Corp. v. Daiflon, Inc., 449 US 33, 34-35 (1980); In Re: Warden, Kentucky State Penitentiary, No. 88-5521, slip op. 4-5 (6th Cir. Jan 18,1989).

Accordingly, it is ORDERED that appellees' motion to dismiss the appeal for lack of jurisdiction be and hereby is granted. Rule 8, Rules 6th Cir. It is further ORDERED that all other pending motions in the appeal be and hereby are denied.

US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. C-3-88-269 filed Feb 3, 1989 ORDER

As this matter was appealed to the US Court of Appeals forthe Sixth Circuit on Dec 12, 1988 (doc 58), and as the entire file was sent to the Court of Appeals and received on Jan 23, 1989, the District Court has no jurisdiction to proceed with this case until instructed to do so. Therefore, no outstanding motion or future motion will be addressed by this Court unless and until directed to do so by the US Court of Appeals for the Sixth Circuit.

IT IS SO ORDERED. Herman J. Weber, Judge

Supreme Court, U.S.
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88-1599

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In Re: FRANK J. VONDERSAAR,
Petitioner.

Petition for Writ of Mandamus to United States District Court for the Southern District of Ohio Western Division

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has satisfied the burden of showing extraordinary cause warranting the issuance of a writ of mandamus?

TABLE OF CONTENTS

	Page
Question Presented	1
Table of Authorities	iv
Statutory Provisions Involved	1
Response to Prayer	2
Statement of the Case	2
Argument	4
I. PETITIONER HAS FAILED TO DEMONSTRATE THE EXISTENCE OF AN EXCEPTIONAL CIRCUMSTANCE WARRANTING THE ISSUANCE OF A WRIT OF MANDAMUS	4
II. ADEQUATE RELIEF IS AVAILABLE TO PETITIONER IN ANOTHER FORUM, PRECLUDING THE ISSUANCE OF THE WRIT.	6
CONCLUSION	7
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:

Allied Chemical Corp v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 5

Bankers Life & Cas. Co. v. *Holland*, 346 U.S. 379 (1953) 4

Barber v. *Barber*, 21 How. 582 (U.S. 1859) 7

Dist. Col. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) 6

Louisville & Nashville R.R. Co. v. *Mottley*, 211 U.S. 149 (1908) 5

In Re McDonald, 109 S.Ct. 993 (1989) 5

Roche v. *Evaporated Milk Assn.*, 319 U.S. 21 (1945) 4

Thompson v. *Thompson*, 108 S.Ct. 513 (1988) 7

United States v. *Duell*, 172 U.S. 576 (1899) 4

Statutes:

28 U.S.C. § 1651(a) 1, 4

Rule 26, Rules of the United States Supreme Court 1, 2, 4

88-1599

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In Re: FRANK J. VONDERSAAR,
Petitioner.

Petition for Writ of Mandamus to United States District Court for the Southern District of Ohio Western Division

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED.

28 U.S.C. §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 26. Considerations governing issuance of extraordinary writs

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that ade-

quate relief cannot be had in any other form or from any other court.

RESPONSE TO PRAYER

Respondent, Michal Varner, respectfully requests that the Court deny Petitioner's prayer for writ of mandamus to the United States District Court for the Southern District of Ohio, Western Division, on the grounds that pursuant to Supreme Court Rule 26 there exist no exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief is available to Petitioner in another forum. For the following reasons, Petitioner's prayer for writ of mandamus is not well-taken and this Court should deny same.

STATEMENT OF THE CASE

On June 2, 1988, Petitioner filed his complaint in the United States District Court for the Southern District of Ohio in Dayton, Ohio, style of the case *Vondersaar* v. *Edwin Meese, III, et al.*, Case No. C-3-88-269. Petitioner alleged, *inter alia*, a conspiracy between Respondent Michal Varner and other co-defendants to deprive Petitioner of his civil rights and to obstruct justice in the conduct of a judicial proceeding. Specifically, Petitioner complains of a visitation order recommended by Michal Varner as referee of the Greene County, Ohio, Court of Common Pleas.

On November 2, 1988, Petitioner filed a motion for preliminary injunction requesting, *inter alia*, that the district court grant visitation rights with his daughter. (Docket No. 39).

In its decision filed November 18, 1988, the Court raised a number of serious subject matter jurisdictional questions *sua sponte* and ordered Petitioner to file a brief on several jurisdictional questions before ruling on any pending motions. (Docket No. 45). Ignoring the Court's order, Petitioner filed a

motion requesting an immediate ruling on his motion for preliminary injunction. (Docket No. 46). The Court denied Petitioner's request for an expedited disposition of his motion for preliminary injunction prior to Petitioner's compliance with the Court's order for briefing (Docket No. 53).

On December 12, 1988, Petitioner filed his notice of appeal to the United States Court of Appeals for the Sixth Circuit (Case No. 88-4175), on the grounds that the District Court's refusal to rule on Petitioner's motion for preliminary injunction in a "timely manner" constituted a "de facto" denial of the preliminary injunction. (Docket No. 58).

In conjunction with the notice of appeal, Petitioner moved the Court of Appeals for a preliminary injunction requesting, as before, visitation rights with his daughter. Twenty-two days later, Petitioner requested an immediate ruling on his motion for preliminary injunction.

Following dismissal by the Court of Appeals for want of jurisdiction, Petitioner moved to amend his appeal and requested a writ of mandamus directing the trial judge to rule on his motion for preliminary injunction. Petitioner's motion to reconsider was denied on March 21, 1989.

Petitioner requests this Court to issue a writ of mandamus directing the trial judge to immediately rule on Petitioner's motion for preliminary injunction filed November 2, 1988.

ARGUMENT

I. PETITIONER HAS FAILED TO DEMONSTRATE THE EXISTENCE OF EXCEPTIONAL CIRCUMSTANCES WARRANTING THE ISSUANCE OF A WRIT OF MANDAMUS.

Petitioner contends that the District Court's refusal to rule on his motion for preliminary injunction for over four months deprived him of his constitutional right to due process of law and a timely dispensation of justice. Petitioner seeks a writ of mandamus from this Court, pursuant to 28 U.S.C. § 1651(a), directing the trial judge to immediately rule on his motion for preliminary injunction.

This Court has recognized that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. A party seeking issuance of the writ must show that he has no other adequate means to obtain relief, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1945); and that he satisfies the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953), quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

The issuance of a writ of mandamus is not a matter of right, but of the Court's discretionary power. Supreme Court Rule 26 provides in pertinent part:

> "The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown . . ., that *there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.*" (emphasis added.)

Petitioner has violated the letter and spirit of Rule 26, failing to demonstrate the existence of any extraordinary cir-

cumstances justifying the issuance of the writ. *In Re McDonald*, 109 S.Ct. 993 (1989).

As noted in the foregoing Statement of Facts, the district court, in its decision of November 18, 1988, raised several serious subject matter jurisdictional questions *sua sponte* and ordered Petitioner to file a brief regarding same. To this date, Petitioner has failed to follow the district court's order for briefing. Instead, Petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit, arguing that the district court's refusal to immediately rule on his motion for preliminary injunction constituted a "de facto" denial of that relief, giving rise to appellate jurisdiction. The Sixth Circuit dismissed the appeal for want of jurisdiction, noting that no authority, statutory or otherwise, supported Petitioner's proposition.

Petitioner moved to amend his appeal to request a writ of mandamus commanding the trial judge to rule on his motion for preliminary injunction. Petitioner is clearly not entitled to such extraordinary relief from the Sixth Circuit, and likewise, from this Honorable Court, because the district court "is presently engaged in the prompt disposition of his request for injunctive relief." (Petitioner's Appendix p. A7).

Federal courts are courts of limited jurisdiction and are under a duty *sua sponte* to examine the existence of subject matter jurisdiction in every case, even if not raised by the parties. *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908). Such action was taken by the district court in its order filed November 18, 1988. The court afforded Petitioner the opportunity to brief those issues before rendering any decision. Petitioner's failure to brief those issues is the reason behind any delay in the district court's disposition of his request for injunctive relief.

This Court has held that only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Petitioner has failed to show

that the district court's order of briefing was an abuse of discretion; certainly he has not shown that his right to relief from this order is clear and indisputable. Clearly, the discretionary act of ordering Petitioner to show why his complaint should not be dismissed on jurisdictional grounds does not rise to the level of judicial usurpation of power justifying the extraordinary relief of mandamus.

It is respectfully submitted, therefore, that Petitioner's prayer for writ of mandamus is not well-taken and should be dismissed.

II. ADEQUATE RELIEF IS AVAILABLE TO PETITIONER IN ANOTHER FORUM, PRECLUDING THE ISSUANCE OF THE WRIT.

The record indicates that the district court suspended a ruling on Petitioner's motion for preliminary injunction due to the serious doubt as to subject matter jurisdiction. Petitioner complains of a visitation order recommended by Respondent, Michal Varner, in her capacity as Referee for the Greene County, Ohio, Court of Common Pleas, temporarily terminating Petitioner's visitation rights with his daughter. It is evident that he seeks relief from this order in the form of visitation rights.

Respondent concurs with the District Court Magistrate (Docket No. 65) that federal district courts have no jurisdiction to review decisions of state trial courts. *Dist. Col. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). Petitioner's remedy would have been to appeal to the Ohio Court of Appeals, Second District, and ultimately to the Ohio Supreme Court.

Furthermore, Petitioner requests the district court to exercise domestic relations powers by awarding him visitation rights with his daughter. Respondent further agrees with the District Court Magistrate (Docket No. 65) that federal courts have uniformly refused to exercise domestic relations powers,

even when an independent basis for jurisdiction exists, e.g., diversity jurisdiction or pendent jurisdiction. *See Barber* v. *Barber*, 21 How. 582 (U.S. 1859); *Thompson* v. *Thompson*, 108 S.Ct. 513 (1988). Petitioner's protestations to the contrary, the district court lacks the jurisdiction necessary to exercise domestic relations powers.

Petitioner's contention that the relief sought is not available in any other court is simply untrue. As noted above, Petitioner's proper remedy lies in an appeal with the state court. Even if the Court should find an abuse of discretion on the part of the district court, Petitioner can obtain adequate relief by filing an appeal with the state court. Therefore, pursuant to Supreme Court Rule 26 Petitioner's prayer for writ of mandamus should be denied.

CONCLUSION

For the reasons set forth above, Respondent requests that this Court dismiss Petitioner's prayer for writ of mandamus directed to the United Sates District Court for the Southern District of Ohio, Western Division at Dayton.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Civil Action No. C-3-88-269
Judge Weber
Magistrate Merz

FRANK J. VONDERSAAR,

Plaintiff,

vs.

EDWIN MEESE, III, et al.,

Defendants.

DECISION AND ENTY ON PENDING MOTIONS
ORDER FOR BRIEFING
(Filed November 18, 1988)

This case is before the Court upon a number of pending motions, all of which are ruled upon as follows:

1. Plaintiff's Amended Motion to Disclose Applications and Orders for Electronic Surveillance (Doc. #23) is DENIED on the same grounds set forth in District Judge Rice's prior Decision and Entry (Doc. #15) denying the original application. The Magistrate finds that the Amended Motion adds nothing material to the original application. Plaintiff asserts that the Court can infer from Defendants' memorandum in opposition to disclosure that there is in fact something to be shielded from disclosure. Plaintiff has employed the logical construct of the negative pregnant, but it is in this case a fruitless conception. The Magistrate finds, as did Judge Rice, that the

relevant Defendants have unequivocally denied that Plaintiff has been the target of any electronic surveillance.

2. Plaintiff's Motions to Compel Answers to Interrogatories from the Department of Defense (Doc. #19), Edwin Meese, III (Doc. #20), and the Department of Justice (Doc. #21) are DENIED for a number of reasons. First of all, the Departments of Justice and Defense are not defendants in this action. Plaintiff's assertion (Doc. #43) that somehow they have become parties by equitable estoppel or by the use of their names in the caption of a pleading filed by the United States Attorney betrays a lack of basic understanding of civil procedure. Entities (assuming they are *sui juris*, a doubtful matter as to these two entities) become defendants by being named in a complaint and served with process, neither of which has occurred in this case as to the Department of Defense or Justice.

Secondly, the motions to compel were filed in violation of S.D. Ohio R. 4.3.3. and 4.3.4. Plaintiff's assertion that he need not consult with Mr. Quinn before filing such a motion because Mr. Quinn is merely an agent of a "fascist administration" misreads S.D. Ohio R. 4.3.3 and 4.3.4 which contain no exceptions based on the belief of a moving party that the opposing counsel represents a "fascist administration."

3. Plaintiff's Motion to Compel Defendant William Barney, III, to respond further to interrogatories (Doc. #24) is DENIED in that it also was filed in violation of S.D. Ohio R. 4.3.3 and 4.3.4.

4. Plaintiff's Motion to Compel Defendant Michal Varner to respond to interrogatories is MOOT in that the apparent deficiencies in the response have been dealt with by Defendant Varner's Response (Doc. #34).

5. The Motions of Defendants Michal Varner (Doc. #36) and Judson Shattuck (Doc. #38) for protective orders and the responsive Motion to Compel of Plaintiff (Doc. #37) are all DENIED. None are accompanied by the affidavit required

by S.D. Ohio R. 4.3.4 showing compliance with S.D. Ohio R. 4.3.3. However, the Magistrate notes that Referee Varner's and Judge Shattuck's response that they are not the custodians of the file sought are sufficient responses under Fed. R. Civ. P. 34 to any request to them to produce the file in question. The proper custodian is, as Plaintiff knows, the Clerk of Courts of Greene County.

6. Plaintiff's Motion to Compel (Doc. #40) the Justice Department and Defense Department to furnish the last known addresses of Edwin Meese, III, and Caspar Weinberger is DENIED for the reason set forth above that these entities are not properly subject to interrogatories under Fed. R. Civ. P. 33 because they are not parties in this action. The Magistrate also notes that this motion was filed without compliance with S.D. Ohio R. 4.3.4.

ORDER FOR BRIEFING

The Complaint in this case raises a number of serious subject matter jurisdiction questions. This Court is under a duty to raise such questions *sua sponte*, even if not raised by the parties. *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908). The Court believes the parties should have an opportunity to brief these issues before any decision.

Accordingly, it is hereby ORDERED that Plaintiff shall file a brief on the following issues not later than December 15, 1988:

1. Why is not the Plaintiff's claim for reinstatement in the Air Force barred by the doctine of exhaustion of administrative remedies in that Plaintiff has not demonstrated to the Court that he has applied for relief to the Air Force Board for the Correction of Military Records?

2. Has Plaintiff exhausted his administrative remedies regarding his FAA medical certificate? At one point in this litigation, the United States Attorney claimed that Plaintiff had then pending a new application for such a certificate which had not been ruled upon and that he had defaulted by

failing to appear for an administrative law judge hearing on a prior application.

3. To the extent Plaintiff seeks relief in the nature of custody of his child or visitation rights with her, why is not this claim jurisdictionally barred by the long-standing policy of the United States courts to refuse to exercise domestic relations jurisdiction? *See, Barber* v. *Barber*, 21 How. 582 (U.S. 1859); *Thompson* v. *Thompson*, 108 S. Ct. 513 (1988).

4. To the extent this action asks this Court to review and revise in some way a decision of the Greene County Common Pleas Court, why is not jurisdiction barred by the doctrine of *Dist. Col. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)?

Defendants herein may file responsive briefs on these questions and any other jurisdictional matters raised by Plaintiff's brief or by the case not later than January 16, 1989.

Additionally, the Magistrate notes that Judge Shattuck and Referee Varner are entitled to have their immunity defenses determined prior to discovery. *Poe* v. *Haydon*, 853 F. 2d 418 (6th Cir. 1988). Accordingly, all further discovery against said Defendants is stayed pending resolution of the immunity defense. Counsel for said Defendants are ordered to file motions for summary judgment directed to the immunity defense not later than December 15, 1988, to which Plaintiff shall respond within the time allowed by S.D. Ohio 4.0.2.

/s/ MICHAEL R. MERZ
UNITED STATES MAGISTRATE

November 18, 1988.

CASE NO: 88 - 1599

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

****

October Term, 1988

****

FRANK J. VONDERSAAR, Petitioner

v.

JUDSON SHATTUCK, et al., Respondent

****

MEMORANDUM OF RESPONDENT, JUDSON SHATTUCK IN OPPOSITION TO PETITIONER FRANK J. VONDERSAAR'S PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Is petitioner entitled to a writ of mandamus from this court directing the District Court to rule on a request for a preliminary injunction in a case in which the magistrate of the District Court has already issued a report finding a lack of subject matter jurisdiction?

PARTIES TO THE PROCEEDING

Edwin Meese, III

Caspar W. Weinberger

Elizabeth H. Dole

William Barney, III

Michal Varner

Judson Shattuck

Leslie J. Vondersaar nka Steadman

Jene Fuller

James Fuller

Frank J. Vondersaar

TABLE OF CONTENTS

TABLE OF AUTHORITIES....	i.
QUOTES OF RULES AND STATUTES.....	1.
STATEMENT OF THE CASE...	9.
ARGUMENT.....	14.
CONCLUSION.....	18.
CERTIFICATE OF SERVICE.....	19.

TABLE OF AUTHORITIES

Cases Cited

Acton Corp. v. Borden, Inc.
670 F. 2d 377
(1982, 1st Cir.)..... 16.

Barber v. Barber
21 How. 582
(U. S., 1859)..... 14, 17.

Dist. Col. Court of Appeals v. Feldman,
460 U. S. 462 (1983).... 15, 17.

U. S. Code

28 U. S. C.
§1291..... 2.

28 U. S. C.
§1292..... 3.

Ohio Civil Rule

Civil Rule
R. 53 (E)(2)..... 1.

STATUTES AND RULES

INVOLVED IN THIS MATTER

OHIO CIV. RULE 53 (E) (2)

"(2) **Objections to Report.** A party may, within fourteen days of the filing of the report, serve and file written objections to the referee's report. If objections are timely served and filed by any party, any other party may serve and file objections within ten (10) days of the date on which the first objections were filed, or within the time otherwise prescribed by this rule, whichever period last expires. Such objections shall be considered a motion. Objections shall be specific and state with particularity the grounds therefor. Upon consideration of the objections the court may: adopt, reject or modify the report; hear additional evidence; return the report

to the referee with instructions; or hear the matter itself."

28 U.S.C. §1291 and 1292

"§1291. Final decisions of district courts

The court of appeals (0ther than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

§1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order,

if application is made to it within ten days after the entry of the order: **Provided, however,** That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals

for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case

may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court."

STATEMENT OF THE CASE

Petitioner filed a pro se action in the district court alleging a conspiracy among this Respondent and, inter alia, various agencies of the Federal government to deprive him of his alleged Constitutional interest in visitation rights with his daughter, whose custody has been placed with Petitioner's former wife.

This Respondent's part in the underlying decision in a Greene County, Ohio, divorce case, and hence the alleged conspiracy, was as a judge of the Greene County Common Pleas Court. On July 10, 1986, a Referee of the Greene County Domestic Relations Court filed a recommendation that Petitioner be denied visitation with his daughter. The recommendation was not objected to,

and hence not brought before this Respondent Judge, until a motion was filed by Petitioner herein to vacate the Referee's recommendation on April 25, 1988, well beyond the time allowed for filing objections to such Referee's recommendations by Ohio Civ. R. 53 (E)(2). This Respondent ruled against the motion to vacate on May 13, 1988. No appeal was taken to an Ohio court of appeals.

Instead, Petitioner filed the instant action on June 2, 1988, and subsequently filed a request for preliminary injunction on November 2, 1988, seeking visitation rights with his daughter pending a decision on the merits of his complaint.

The magistrate to which this case was referred decided, on November 18,

1988, various pending motions and ordered briefs to be submitted arguing, inter alia, the jurisdiction of the Federal courts. This Respondent was also ordered to file a summary judgment motion as to his defense based on judicial immunity, which he did on or about December 8, 1988. The magistrate issued a Report recommending that summary judgment in regard to both the injunctive relief request and the request for money damages be entered in this Respondent's favor on December 19, 1988. Objections were filed to this report by Petitioner in the District Court.

Notwithstanding and separate from the summary judgment motions pertaining to judicial immunity, Petitioner objected to the magistrate's request for memoranda pertaining to jurisdictional issues prior to deciding his request for a

preliminary injunction by "appealing" to a judge of the District Court on December 7, 1988. Only five days later, without action from the District Court, Petitioner, believing that the District Court had not decided his motion expeditiously, filed an appeal to the Sixth Circuit Court of Appeals from an alleged "de facto" final order denying his motion for preliminary injunction. The Court of Appeals, on motion of several Appellees, dismissed the appeal, finding a lack of jurisdiction for deciding such an appeal in that there was no final order from the District Court to appeal. The Court of Appeals suggested that the Petitioner's action was better styled as a mandamus action, but noted in passing that Petitioner was not entitled to that relief, either.

Petitioner then moved for rehearing

and for permission to amend his appeal to a petition for a writ of mandamus in the Court of Appeals. The Court of Appeals denied the rehearing, but did not rule on the request to amend. Petitioner then filed the instant petition for writ of mandamus in this Supreme Court of the United States.

ARGUMENT

The first step in any action brought in a Federal court is to determine whether those courts have jurisdiction over the action. Petitioner's original complaint pertains to an attempt to obtain visitation privileges with his daughter. The Federal courts have disclaimed jurisdiction in the field of divorce. Barber v. Barber 21 How. 582 (U. S., 1859). No rationale has been advanced by Petitioner as to why this disclaimer should not be followed in the instant case. Accordingly, no Federal court should exercise jurisdiction in this matter as it pertains to visitation with Petitioner's child.

In addition, the effect of what Petitioner seeks to do is to have the District Court review the decision

of the Greene County Common Pleas Court. This the Federal trial courts may not do. Dist. Col. Court of Appeals v. Feldman, 460 U. S. 462 (1983). The Federal trial courts are without authority to do this, and mandamus should not lie to order that the District Court exercise a non-existent power.

Assuming arguendo that the Federal system in general has jurisdiction and should exercise the same over the subject matter of the complaint, the matter is not ripe for decision by this court. If this is considered an appeal from the decision of the Court of Appeals, the District court entered no final order for the Court of Appeals to review, and therefore the Court of Appeals had no jurisdiction pursuant to 28 U.S.C. §1291 and 1292 to consider Petitioner's appeal. This

court should therefore affirm the Court of Appeals's order dismissing the appeal.

If this is considered a petition for a writ of mandamus, the action is both without merit and not ripe for decision. The action is without merit because a writ of mandamus will be granted at common law only when Petitioner is clearly entitled to the same. The party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. Acton Corp. v. Borden, Inc., 670 F. 2d 377 (1982, 1st Cir.).

In the instant case, Petitioner has not allowed the District Court sufficient time to decide his motion, as noted by the Court of Appeals decision and so the matter is not ripe for decision. The Magistrate's concern over subject matter jurisdiction and his

request for memoranda on that question before rendering a decision on the injunction request are perfectly reasonable, and Petitioner is unjustified in feeling that no decision will be rendered by the District Court once memoranda are submitted as ordered.

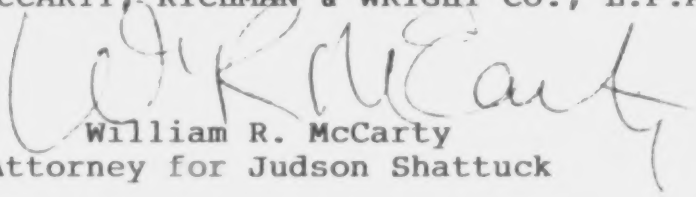
In addition, as argued above, the District Court has no jurisdiction under Feldman and Barber and therefore the Petitioner is not clearly and indisputably entitled to the relief he requests. For these reasons, the writ of mandamus should not issue on the merits of the request.

CONCLUSION

This Respondent urges this Court to deny Petitioner's request for a Writ of Mandamus and to return the case to the District Court.

Respectfully submitted,

MARTIN, McCARTY, RICHMAN & WRIGHT CO., L.P.A.



William R. McCarty
Attorney for Judson Shattuck

CERTIFICATE OF

SERVICE

The undersigned hereby certifies that three copies of the within Memorandum of Judson Shattuck was mailed by regular U. S. Mail to the following:

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